No. 88-1692

MOTION FILED
MAY 18 1989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
v. *Petitioner,*
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
v. *Petitioner,*
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
v. *Petitioner,*
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Washington Metropolitan Area Transit Authority ("WMATA") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for

petitioners to the filing of this brief was obtained. However, the consent of counsel for respondents was refused.

WMATA is the mass transit agency serving the Washington, D.C. metropolitan area that was created with Congress' approval by an Interstate Compact whose signatories include the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. Since the early 1970s, WMATA, which is responsible for constructing and operating the Metrorail transit system, has employed a wrap-up insurance program to guarantee workers' compensation coverage. Under this wrap-up program, WMATA, instead of its individual subcontractors, acquires workers' compensation coverage for *all* Metrorail construction laborers by purchasing a single, comprehensive insurance policy.

In *WMATA v. Johnson*, 467 U.S. 925 (1984), this Court specifically concluded that under the plain language of the District of Columbia Workmen's Compensation Act of 1928 WMATA's wrap-up program entitled it to immunity from tort liability for injuries sustained by its subcontractors' employees. In the five years since the *WMATA v. Johnson* decision, WMATA has continued its wrap-up program in reliance on that decision. However, the lower court's refusal to follow this Court's construction of the same statutory language that was at issue in *Johnson* jeopardizes the continued utility of WMATA's wrap-up program. If WMATA is liable for injuries to subcontractors' employees notwithstanding the fact that it has secured compensation benefits for those workers, the wrap-up coverage would be uneconomical for WMATA. Furthermore, the threat of unexpected millions of dollars in tort liability will pose serious budgetary problems for WMATA and threaten the stability and financial integrity of transportation services in the Washington metropolitan area.

Accordingly, WMATA submits that its participation as *amicus* will aid the Court's understanding of the im-

portant interests that are affected by the *Johnson* decision and that are now seriously threatened by the lower court's decision.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	2
A. Introduction	2
B. WMATA's Worker-Compensation Program	2
C. WMATA's Judicial Defense of Its Worker-Compensation Program	4
D. The Importance of *Johnson* to WMATA	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. The Decision Below Violates the Doctrine of *Stare Decisis* by Failing to Adhere to this Court's Definitive Construction of the Statutory Language at Issue	8
II. The Decision Below Would Severely Undermine the Longstanding Workers' Compensation Programs Employed by WMATA and Other General Contractors in the District of Columbia	10
III. These Cases Constitute Unauthorized Policy-making by the Court Below	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Allen v. United States, 625 F. Supp. 841 (D.D.C. 1986) 8
Chan v. Korean Air Lines, Ltd., 57 U.S.L.W. 4432 (April 18, 1989) 14
Estep v. Construction General, Inc., C.A. No. 126-81 (D.C. Sup. Ct. April 3, 1985) 9
Estep v. Construction General, Inc., 546 A.2d 376 (D.C. 1988) 5, 9
Ford v. United States, No. 84-3082 (D.D.C. March 22, 1985) 8
Frazier v. Faith Construction Co., C.A. No. 6602-84 (D.C. Sup. Ct. July 23, 1985) 9
Hatter v. George A. Fuller Co., C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984) 9
Hobbs v. KBR Corp., C.A. No. 803-84 (D.C. Sup. Ct. Nov. 19, 1985) 9
Holmes v. Leon N. Weiner & Associates, 603 F. Supp. 122 (D.D.C. 1985) 8
In re Metro Subway Accident Referral, 630 F. Supp. 385 (D.D.C. 1984), *aff'd*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987) 8
Keener v. WMATA, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) 5, 8
Meiggs v. Associated Builders, Inc., C.A. No. 2563-84 (D.C. Sup. Ct. May 1, 1985) 8
O'Connell v. Maryland Steel Erectors, Inc., 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986) 5
Stokes v. George Hyman Constr. Co., No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir. Jun. 24, 1985) 8
The Amiable Isabella, 19 U.S. (6 Wheat.) 1 71 (1821) 14
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 9
United States v. Maine, 420 U.S. 515 (1975) 9
WMATA v. Johnson, 467 U.S. 925 (1984) ..... *passim*

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS Page

District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) (repealed 1982) 5
District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) 5
National Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982 & Supp. IV 1986) 5
Urban Mass Transportation Act of 1964, § 12, 49 App. U.S.C.A. § 1615(f) (Supp. 1989) 3
Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966) 2
49 C.F.R. §§ 23.1 *et seq.* (1987) 3

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BRIEF FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

A. Introduction.

The Washington Metropolitan Area Transit Authority ("WMATA") is the mass transit agency serving the Washington, D.C. metropolitan area. WMATA is an interstate agency created with Congress' approval by the Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), whose signatories included the State of Maryland, the Commonwealth of Virginia, and the District of Columbia. It is this Court's decision in favor of WMATA in *WMATA v. Johnson*, 467 U.S. 925 (1984)—along with the lower court's refusal to follow that decision in the present cases—that forms the centerpiece of the present petition for a writ of certiorari. Because WMATA has placed great reliance on the *Johnson* decision, because the lower court's refusal to follow that decision threatens WMATA's ability to ensure continued compensation benefits to injured workers, and because that refusal may also jeopardize WMATA's delivery of transportation services in the Washington area, WMATA strongly supports the petition.

B. WMATA's Worker-Compensation Program.

WMATA is responsible for constructing and operating the public transportation system in and around the Nation's Capital, including the rapid transit system popularly known as Metrorail. Primarily as a result of the still-ongoing construction of the Metrorail system, WMATA has become one of the Washington metropolitan area's largest general contractors, contracting with literally scores of subcontractors to carry out the actual construction of the system. In its capacity as the general contractor for the Metrorail system, WMATA has consistently met its obligations under the District of Columbia's workers' compensation statutes to secure workers' compensation for the employees of its subcontractors.

Beginning in the early 1970s, WMATA departed from its prior practice of allowing each individual subcontractor to purchase workers' compensation insurance for its own employees, and adopted instead a centralized insurance program known as a "wrap-up" program. Under its wrap-up approach to guaranteeing compensation, WMATA, rather than its individual subcontractors, actually acquires workers' compensation coverage for *all* Metrorail construction laborers by purchasing a single, comprehensive insurance policy. Wrap-up programs like WMATA's are now commonplace in large-scale construction projects in the District of Columbia.

WMATA adopted its wrap-up approach for several reasons. First, WMATA's prior experience was that many of its subcontractors, most notably many of its minority subcontractors,[1] were unable to obtain and/or qualify for individual workers' compensation insurance policies. The wrap-up approach eliminates this problem. In addition, a centralized wrap-up policy ensures that coverage for injured employees is both comprehensive and continuous, whereas under a system in which individual subcontractors obtain insurance, individual policies may lapse without the general contractor having knowledge of the resultant gap in employee coverage.

Moreover, a wrap-up policy is beneficial to employees and the courts, since a single insurance policy obtained by the general contractor eliminates the need for courts to referee disputes as to which entity in the chain of contractors—*e.g.*, the subcontractor or the general contractor—should pay for a particular worker's injuries. Under a wrap-up policy, employees who can make the requisite demonstration of work-related injuries directly

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[1] Because it receives federal funding, WMATA is charged with ensuring that minority business enterprises have a full opportunity to participate in construction of the Metrorail system. *See* Urban Mass Transportation Act of 1964, § 12, 49 App. U.S.C.A. § 1615(f) Supp. 1989; 49 C.F.R. §§ 23.1 *et seq.* (1987).

qualify for compensation under the general contractor's policy without having to first demonstrate that their immediate employers, the subcontractors, had affirmatively defaulted on their separate obligation under the statute to secure compensation. In addition, a wrap-up policy is preferable because, in WMATA's experience, a single insurance policy incurs smaller premiums than would be the case if the numerous subcontractors independently had to purchase separate insurance policies.

Finally, WMATA adopted the wrap-up approach to compensation with the understanding that it would be entitled to the immunity from tort suits brought by injured subcontractor employees that the District workers' compensation laws bestow upon those entities that do not default on their statutory duty to secure workers' compensation. As this Court recognized in *WMATA v. Johnson*, this immunity is the *quid pro quo* that underlies all workers' compensation programs: in return for guaranteeing that compensation will be available to injured employees, employers or contractors are immunized from tort suits by those employees for those same injuries. 467 U.S. at 931-32.

C. WMATA's Judicial Defense of Its Worker-Compensation Program.

WMATA has had its wrap-up program in place for over 15 years. When necessary, WMATA has moved vigorously in the courts to protect the integrity of the program and its entitlement to immunity under it. Thus, WMATA was the prevailing party in this Court's 1984 *Johnson* decision, which definitively construed the District's statutory language in question to confer immunity upon general contractors such as WMATA. *See WMATA v. Johnson*, 467 U.S. at 940-41. Similarly, WMATA took the lead, either as a named party or as *amicus curiae*, in the extensive litigation following the *Johnson* decision which has confirmed that *Johnson*'s rule of immunity is still applicable in the District of Columbia notwithstand-

ing Congress' 1984 amendments to the National Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982 & Supp. IV 1986), which were aimed at legislatively nullifying the *Johnson* decision at the national level. *See, e.g., Keener v. WMATA*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Estep v. Construction General, Inc.*, 546 A.2d 376 (D.C. 1988) Petitioners' Appendix ("Pet. App.") 42a-70a.[2]

Having successfully defended the integrity of its wrap-up program in the *Johnson/Keener/Estep* line of cases that arose under the District's 1928 workers' compensation statute (the "1928 Act"),[3] WMATA has also participated as an *amicus curiae* in the instant litigation, which arises under the District's current workers' compensation law (the "1979 Act").[4] Because the 1979 Act adopted virtually verbatim the precise statutory language construed in the *Johnson*, *Keener*, and *Estep* cases, WMATA has vigorously contended that this Court's construction of that language should be followed, in the absence of any affirmative indication that the legislature intended that language to mean something different in the 1979 Act than it meant in the predecessor 1928 Act. Now, however, the lower court has held in two contradictory decisions that while the 1928 Act grants WMATA immunity (*Estep v. Construction General*), the same statutory language in the 1979 Act denies immunity (the decision below).

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[2] WMATA also participated in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986), which was the first appellate decision to reject the contention that the 1984 amendments to the National Longshore Act applied to cases arising under the District's compensation statute.

[3] District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) (repealed 1982).

[4] *See* District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981).

D. The Importance of *Johnson* to WMATA.

In the five years since this Court's *Johnson* decision, WMATA has continued its wrap-up program in reliance on that decision. WMATA has expended approximately $19.5 million to secure its wrap-up insurance policies during that time. Now, however, the utility of WMATA's wrap-up program is in serious jeopardy as a result of the opinion below, which holds, *in direct contradiction to this Court's Johnson decision*, that WMATA is liable for injuries to subcontractor employees notwithstanding the fact that it has secured workers' compensation benefits for those workers. Plainly, if WMATA is to receive no *quid pro quo* immunity in exchange for acquiring workers' coverage, that full coverage makes no economic sense to WMATA. Moreover, the threat of unexpected, untold millions of dollars in tort liability not only will pose enormous budgetary problems for WMATA and its signatories, but it may also threaten the stability and financial integrity of transportation services in the Washington metropolitan area.[5]

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[5] WMATA's records show that approximately 1500 compensation claims have been filed against WMATA by injured subcontractor employees under the 1979 Act. With the construction of several segments of the Metrorail system still underway or planned, this figure will inevitably swell in the future. Based upon past patterns of tort filings in similar circumstances, WMATA could reasonably be expected to face at least a hundred million dollars in tort claims by the injured employees if WMATA is held not to be entitled to immunity under the 1979 Act by virtue of having secured compensation through the wrap-up program.

Under WMATA's budgetary procedures, any payments for tort damages would come from WMATA's construction funds. Diverting significant amounts of construction monies to tort payments would severely curtail WMATA's construction obligations. The resulting budgetary difficulties as a practical matter could be remedied only by contributions from the treasuries of the Signatories of the WMATA Compact. In this era of budgetary restraints at the state and local level and strong public opposition to governmental revenue increases of any kind, such a funding alternative realistically cannot be counted on to resolve tort-related funding short-

For all these reasons, WMATA has a paramount interest in these cases and in the protection of the *Johnson* decision.

SUMMARY OF ARGUMENT

In addition to flouting this Court's construction of the statutory language here at issue, the lower court's decision does violence to the principle of *stare decisis* and to the important interests that principle protects. WMATA and similarly-situated contractors have relied on the *Johnson* decision to put in place costly—and highly beneficial—worker-compensation programs. The lower court's purported rejection of *Johnson* is not only unfair to these contractors, but it also constitutes a misuse of judicial resources for that court to have relitigated the meaning of language *Johnson* found to be "plain."

Moreover, this purported rejection of *Johnson* will undermine the very purposes that worker's compensation statutes such as the District of Columbia's 1979 Act were designed to serve. Indeed, as *Johnson* itself made clear, the denial of immunity in cases such as the present ones will lead to gaps in worker coverage and needless legal disputes over which entity was responsible for that coverage—all to the detriment of injured workers in need of swift, sure compensation benefits.

Finally, these cases represent another instance of the kind of judicial legislation this Court has repeatedly condemned—lower courts implementing their own notions of wise policy in the face of plain language *the legislature* has adopted.

For all these reasons, in addition to those contained in the petition, the writ should be granted and the judgment below reversed.

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falls. The result in such circumstances would then almost certainly lead to cutbacks in WMATA's overall services—to the detriment of the entire citizenry of (and many visitors to) the Washington metropolitan area.

ARGUMENT

I. The Decision Below Violates the Doctrine of *Stare Decisis* by Failing to Adhere to this Court's Definitive Construction of the Statutory Language at Issue.

The basic question presented by these cases—whether general contractors who do not default on their duty to secure workers' compensation are entitled under the statutory language in question to immunity from tort actions—has now been litigated before several courts, including this Court, for nearly a decade. This protracted litigation has arisen under both the District of Columbia's 1928 compensation statute and the 1979 Act, which have virtually identical statutory language. The courts that have considered this question have, at *every* level, ruled in favor of contractor immunity, including this Court in *WMATA v. Johnson*, 467 U.S. at 940; the United States Court of Appeals for the District of Columbia Circuit;[6] several Judges of the United States District Court for the District of Columbia;[7] several Judges of the Superior Court of the District of Columbia;[8] and even another division of the District of Co-

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[6] *See Keener v. WMATA*, 800 F.2d 1173.

[7] For example, each of the five United States District Court Judges who ruled in the cases at issue in the consolidated *Johnson* litigation found in favor of contractor immunity. *See Johnson*, 467 U.S. at 930-31. *See also, e.g., In re Metro Subway Accident Referral*, 630 F. Supp. 385 (D.D.C. 1984), *aff'd*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987) (1928 Act case); *Holmes v. Leon N. Weiner & Associates*, 603 F. Supp. 122 (D.D.C. 1985) (1928 Act case); *Ford v. United States*, No. 84-3082 (D.D.C. March 22, 1985) (1979 Act case); *Stokes v. George Hyman Constr. Co.*, No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir. Jun. 24, 1985) (1979 Act case). *Contra, Allen v. United States*, 625 F. Supp. 841 (D.D.C. 1986) (1979 Act case).

[8] *E.g., Meiggs v. Associated Builders, Inc.*, C.A. No. 2563-84 (D.C. Sup. Ct. May 1, 1985) (Pet. App. 18a) (1979 Act case);

lumbia Court of Appeals in a decision handed down on the *same day* as the opinion below.[9] Yet despite these precedents, and, most importantly, in the face of this Court's authoritative decision in *Johnson*, the division of the District of Columbia Court of Appeals that considered the present cases reached a contrary result, holding that general contractors such as WMATA are *not* entitled to tort immunity.

The Court of Appeals' attempt to deviate from the series of decisions upholding contractor immunity under the District of Columbia's workers' compensation laws should not be sanctioned. It not only contradicts this Court's definitive construction of the statutory language at issue, but it also runs directly counter to the doctrine of *stare decisis*, a fundamental principle of American law that counsels strongly against re-litigation of already-settled issues, particularly when reopening decided questions would disrupt settled commercial practices. *E.g., United States v. Maine*, 420 U.S. 515, 527-528 & n.9 (1975).[10] Where, as here, not only this Court

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Frazier v. Faith Construction Co., C.A. No. 6602-84 (D.C. Sup. Ct. July 23, 1985) (Pet. App. 20a) (1979 Act case); *Estep v. Construction Gen'l, Inc.*, C.A. No. 126-81 (D.C. Sup. Ct. April 3, 1985) (1928 Act case); *Hatter v. George A. Fuller Co.*, C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984) (1928 Act case). *Contra, Hobbs v. KBR Corp.*, C.A. No. 803-84 (D.C. Sup. Ct. Nov. 19, 1985) (Pet. App. 23a) (1979 Act case).

[9] *See Estep v. Construction General, Inc.*, Pet. App. 42a.

[10] *Accord, Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980):

> [*Stare decisis*] not only plays an important role in orderly adjudications; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rights. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.

Id. at 272.

but several other courts have construed the language at issue to mean one thing over a period of several years, it is simply too late in the day for a division of the District of Columbia Court of Appeals to decide unilaterally that the langauge means just the opposite.

By refusing to follow this Court's analysis in *Johnson*, the court below has upset the settled expectations of WMATA and all other general contractors in the District of Columbia who have secured compensation in the belief that they would receive statutory immunity from subcontractor employee tort suits in return. Such an outcome, if allowed to stand, would be highly inequitable—particularly to WMATA, which has expended considerable time, effort and funds in litigation over the last several years to establish the contractor immunity precedents set forth in the *Johnson/Keener/Estep* line of cases. Accordingly, this Court should grant the petition and reverse the decision below in order to protect the justified expectations of general contractors in the District of Columbia, to avoid the disruptions to ongoing commercial practices that would be caused by reopening settled questions of law, and to maintain the integrity of this Court's own precedent.

II. The Decision Below Would Severely Undermine the Longstanding Workers' Compensation Programs Employed by WMATA and Other General Contractors in the District of Columbia.

In addition to violating the rule of *stare decisis*, the decision below should be overturned in light of the adverse impact it will have on the willingness of general contractors to secure workers' compensation insurance policies in the District of Columbia. As was explained in the "Interest of *Amicus Curiae*" section above, many general contractors in the District have followed WMATA's lead in securing compensation for subcontractor employees through the purchase of wrap-up

workers' compensation insurance policies. In its own case, WMATA has been willing to undertake responsibility for securing compensation for *all* the workers involved in the construction of the Metrorail subway system because of its understanding that such an undertaking would entitle it to immunity from tort actions by any such employees who are injured during the course of their work. If the decision below is allowed to stand and general contractors such as WMATA are not entitled to such immunity under the 1979 Act through purchase of a wrap-up policy, the incentives for purchasing wrap-up insurance would largely disappear, and the workers' compensation arrangements for large-scale construction projects in the District of Columbia could revert to the balkanized, inefficient approach followed in prior years.

As this Court recognized in the *Johnson* decision, the wrap-up approach to compensation for major construction projects offers numerous advantages to several interested parties, all of which could be lost if the utility of wrap-up programs is undercut by the decision below. As Justice Marshall correctly observed in the *Johnson* opinion:

> if the benefits of securing compensation insurance—that is, tort immunity—did not accrue to contractors until subcontractors had affirmatively elected to default, then contractors would be reluctant to incur the considerable expense of securing compensation insurance until they are absolutely convinced that subcontractors were in statutory default. Inevitably, such a rule would create gaps in workers' compensation coverage . . . . [*Johnson*, 467 U.S. at 938.]

Thus, the decision below is harmful to *employees* as well as contractors, since it is the injured workers who suffer most if gaps in compensation coverage occur.

Moreover, such gaps in coverage as a practical matter are highly likely to occur in any complex, multi-faceted

construction project. As the Court found in *Johnson*, inasmuch as many subcontractors are small businesses, it is frequently the case that many such firms—particularly minority subcontractors—are "unable to afford or [lack] sufficient business experience to qualify for their own workers' compensation insurance policies." *Id.* at 929.[11] Gaps in compensation coverage might also occur if general contractors no longer have an incentive to purchase wrap-up policies because subcontractors on occasion allow their individual insurance policies to expire, or find that their insurance carriers have gone out of business. *Id.* Even the most diligent efforts of general contractors such as WMATA to monitor events in order to forestall gaps in statutory coverage historically have proven to be unable to forestall such gaps, given the complexity of large-scale construction projects and the numerous subcontractors involved in those projects. *Id.*

Employees, as well as the courts, benefit from adoption of wrap-up policies by general contractors in another significant way as well. When a general contractor secures a single workers' compensation insurance policy, an injured employee has no doubt where to obtain his or her workers' compensation benefits. Under the approach adopted by the court below, however, general contractors would be liable to provide compensation only upon a showing by the injured employee that his or her immediate employer, the subcontractor, had affirmatively defaulted on its own statutory obligation to secure compensation. This result is a virtual invitation to extensive and costly litigation over this issue in many future individual compensation claims. As this Court held in *Johnson*, there simply is nothing in the statutory lan-

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[11] The frequent inability of minority contractors to obtain workers' compensation insurance in the past was particularly troublesome to WMATA, given its statutory duty to provide such businesses with a full opportunity to participate in construction of the Metrorail system. *See* note 1, *supra*.

guage which suggests that the legislature "intended to unleash such a difficult set of factual inquiries" upon injured employees. *Id.* at 939. Moreover, the avoidance of such burdensome litigation through purchase of wrap-up policies by general contractors has been most helpful to the nation's trial courts, which are already suffering from overcrowded dockets.

Thus, in addition to the financial savings afforded to contractors who procure wrap-up insurance policies, *id.* at 928, such policies provide significant benefits to injured employees, subcontractors, minority businesses, and the courts. The decision below, however, subverts all of these beneficial outcomes in favor of a strained construction of the statute that is at variance with the decisions of numerous other courts—including this Court in *Johnson*—that have construed the language in question to be plain and to bestow immunity on general contractors such as WMATA.

III. These Cases Constitute Unauthorized Policy-making by the Court Below.

The outcome in these cases is all the more troublesome because it smacks of little more than judicial legislation. As the petitioners point out, proposals to amend the 1979 Act to nullify the rule of contractor immunity have been introduced in the last two sessions of the D.C. Council; no action has been taken on those bills, however. *See* Pet. at 29 n.24. WMATA has monitored these legislative initiatives because of their potentially significant impact on WMATA if adopted, only to find that the normal workings of the legislative process have been superseded by the Court of Appeals' decision construing the plain statutory language in question to mean the opposite of what this Court said it meant (and that the authors of the proposed amendments to the 1979 Act necessarily viewed it to mean).

As Justice Scalia recently stated for the Court, "where the text is clear," courts "have no power to insert an amendment" because to do so—as the court below did here—is "to make, and not to construe," the law. *Chan v. Korean Air Lines, Ltd.*, 57 U.S.L.W. 4432, 4436 (April 18, 1989) (*quoting The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.). WMATA therefore agrees with the petitioners that this Court should grant the writ to confirm that if general contractors are to be stripped of immunity in the District of Columbia, that is a task properly left to the people's elected representatives, and not the courts.

CONCLUSION

For the reasons set forth above, as well as those set forth in the petition, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

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